"linked (in some degree) to natural monopoly,"[68] but simply because one specific CLEC had decided not to deploy fiber on that route (yet). Again, "nothing in the Act appears a license . . . to inflict on the economy" such a broad and irrational approach to unbundling.[69]

The CLECs' carrier-specific approach fails for another reason as well. In addition to being divorced from the core question of whether *competition* is possible without unbundling, it also seeks to transfer unbundling from the targeted remedy Congress had in mind to a means of avoiding any risk in seeking new business. As the CLECs see it, they should be entitled to refrain from deploying their own facilities – and should be able to rely instead on unbundled access to ILEC facilities at TELRIC rates – unless and until they have signed contracts with customers that commit those customers to provide enough traffic to fill those newly deployed facilities for several years.[70]

That approach – under which the ILECs would bear all of the risk not only for their own business plans, but also for the CLECs' – would severely distort competition. Telecommunications is a high-risk, capital-intensive business that depends on carefully and accurately forecasting demand, putting facilities in place to meet that demand, and then signing up customers to keep those facilities utilized. The CLECs seek insulation from those business realities. Their approach would allow each of them to serve customers relying on subsidized access to ILEC facilities until and unless each of them has enough committed customers to justify deploying facilities with no risk whatsoever. While that approach may please the CLECs' investors, it would unfairly burden the ILECs and severely distort the market, as there is perhaps

[68] 290 F.3d at 427.

[69] *Id.* at 429.

[70] *See, e.g.*, AT&T at 75; Advanced Telcom's Wigger Decl. ¶ 21 (attached to Loop & Transport Coalition); XO's Tirado Decl. ¶ 13 (attached to Loop & Transport Coalition).

no better way to discourage competitors from deploying their own facilities than to give them risk-free, below-cost access to ILEC facilities.[71]

It is no answer to contend that, simply because ILECs purportedly have ubiquitous fiber networks that already extend to most locations, CLECs are impaired without access to those networks. For one thing, the premise is wrong: ILECs do not have facilities in the ground to all locations and with sufficient capacity to meet demand. Indeed, only a small fraction of commercial buildings are connected to SBC's fiber.[72] Given the explosive growth of the special access market in recent years, ILECs have had to build out their networks, like everyone else, to meet rapidly expanding demand in old and new locations. They are continuing to do so today, and, in so doing, they obviously face the same hurdles as CLECs. In this context, requiring ILECs to unbundle fiber would serve only to discourage further investment by ILECs and CLECs alike.

More to the point, the unbundling provisions of the 1996 Act are not triggered simply where ILECs have something that CLECs do not, particularly where (as here) the CLECs have their own distinct advantages. Rather, those provisions are triggered where the something in question is "linked (in some degree) to natural monopoly"[73] and where failure to make it available on an unbundled basis would, to again use AT&T's formulation, "preclude" efficient

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[71] According to AT&T, in paragraph 303 of the *Triennial Review Order*, "[t]he Commission . . . correctly recognized that competitors build loops only to serve committed traffic, *i.e.*, traffic under a contract between an individual customer and the carrier." AT&T at 75. In fact, the Commission in that paragraph said precisely the opposite, stating that "a competitive LEC that plans to self-deploy its own facilities must target customer locations where there is sufficient demand from *a potential customer base*." *Triennial Review Order* ¶ 303 (emphasis added).

[72] *See* Keown Decl. ¶¶ 14-15 (Attach. D hereto).

[73] *USTA I*, 290 F.3d at 427.

entry. Where competitors have *already* entered without UNE access, that standard obviously cannot be satisfied, regardless of the scope of existing ILEC networks.

Equally unpersuasive is the vague suggestion that, because ILECs' fiber networks were deployed during the era of exclusive franchises, it would be unfair to permit ILECs to take advantage of them in the marketplace, to the exclusion of CLECs. This allegation fails on multiple levels, the most obvious of which is that it is completely divorced from the question of impairment. Aside from that, it is also factually wrong. Most ILEC fiber was deployed *after* the 1996 Act eliminated exclusive franchises. Virtually all of the remainder was deployed under price caps. As the D.C. Circuit has explained, under that regime, "investors rather than ratepayers have borne the risk of loss on [ILEC] assets."[74] Thus, while CLECs are fond of repeating this shopworn rhetoric, it is both legally irrelevant and factually inaccurate.

2. The State Commission Records Reveal That CLECs Can and Do Rely on Competitively Deployed Fiber Facilities

Apart from their distorted understanding of the legal task before the Commission, the CLECs base their maximum unbundling claims on a highly skewed view of the factual evidence assembled in the state *Triennial Review* proceedings prepared by the CLEC witnesses in those proceedings. As explained above, if the CLECs were truly interested in providing the Commission with the evidence it needs to evaluate their claims of impairment, they would have informed the Commission of where they had actually deployed facilities, and at what capacity. The fact that they failed to take this straightforward step – and rely instead on filtered evidence from the state proceedings – is reason enough to deny their claims of impairment.

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[74] *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 570 (D.C. Cir. 1997). Even under rate-of-return regulation, it was the investor, not the state or the ratepayer, that paid for building out the network.

Worse yet, the filtered evidence the CLECs did present is a severely limited and badly skewed depiction of what actually was presented in those state proceedings. The truth of the matter is that, while constrained in many ways (by, among other things, the CLECs' efforts to fend off relevant discovery), the state commission records contain powerful evidence that CLECs can and do deploy their own facilities at capacity thresholds well below the thresholds that the CLECs in this proceeding claim are the minimum necessary for self-deployment.

a. The QSI Analysis Is Badly Flawed

The CLECs pin much of their case on the so-called "QSI Analysis" – a paper prepared by the CLECs' own witnesses in the state proceedings that purports to summarize the records assembled in certain of those proceedings. It is this analysis, they claim, that "eliminate[s] . . . any prior evidentiary gap" in the Commission's *Triennial Review Order* and provides the Commission with all the ammunition it needs to, in effect, reinstate the maximum unbundling rules the D.C. Circuit vacated.[75] In fact, as the Joint Declaration of Scott J. Alexander and Rebecca L. Sparks explains in detail, the QSI analysis portrays nothing more than what the CLECs themselves *argued* before the state commission: to wit, virtually no impairment anywhere. Far from an objective and comprehensive analysis of the state of competitive deployment, the QSI study is a deeply flawed and hopelessly skewed portrayal of the evidence assembled in the state commission proceedings. For multiple reasons, it should be given no weight.

First, by the CLEC witnesses' own admission, the *total* universe of routes they reviewed is limited to the locations and routes, in 14 of 48 states (and the District of Columbia), that the

[75] AT&T at iv; *see also* ALTS *et al.* at 58-60, 79-80; CompTel/ASCENT at 39-40; Covad at 75-76; MCI at 136-37; Loop & Transport Coalition at 78-79, 82-83, 101-02.

ILEC(s) proposed as satisfying the triggers established in the *Triennial Review Order*. Those proposals, in turn, were severely limited by (i) the exceedingly short time frames in the state commission proceedings; (ii) the CLECs' obstinate refusal to provide detailed discovery in many states; and (iii) the unlawfully high triggers previously established by the Commission.[76] In short, with few exceptions, the CLECs did not even bother to analyze a route unless, within a few short months of the *Triennial Review Order*, the CLECs themselves had provided the ILEC enough information to enable the ILEC to establish that the route in question was *already* fully competitive according to the unlawfully high standards adopted in the *Triennial Review Order*. It thus hardly needs stating that the routes the CLEC witnesses analyzed represent a minute fraction of the total competitive fiber that is in the ground and being used to serve customers today.[77]

Second, after starting with that extremely limited subset of data, the CLEC witnesses limited it still further, by in effect crediting, without reservation or even any analysis, *any* CLEC statement or argument intended to remove competitive facilities from the list. Thus, for example, the CLEC witnesses in many cases excluded fiber deployed at the OCn level, on the theory that such fiber could not support DS3 service, even though the CLECs themselves admitted that OCn level facilities are routinely channelized to provide DS3-level service.[78] Likewise, the CLEC witnesses excluded fiber connecting two wire centers, if that fiber did not *directly* connect those wire centers on a point-to-point basis, even though the CLECs themselves concede not only that they do not replicate the ILECs' networks and thus do not build transport

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[76] *See* Alexander/Sparks Decl. ¶¶ 32-38.

[77] This point alone is a complete answer to MCI's reliance (at 135-36) on the high-capacity loop and transport case SBC put on in Michigan.

[78] *See* Alexander/Sparks Decl. ¶ 39.

networks between ILEC wire centers, but also that they can provide dedicated transport between wire centers through facilities that run through an intermediary switch.[79]

Indeed, the shortcomings of the QSI analysis are perhaps no better exemplified than in the conclusions it reaches in California. Even though that state boasts two of the most competitive markets in the country (Los Angeles and San Francisco), and even though it is undisputed that there is an enormous amount of fiber in several MSAs there,[80] QSI concludes that there is not a single competitive route or location in the *entire state*.[81] That conclusion is simply not plausible, and the contrived "study" that yielded it should be disregarded.

b. The State Commission Records in Fact Refute the CLECs' Claims of Impairment

Contrary to what the QSI Study purports to show, an accurate and complete rendering of the evidence compiled during state proceedings actually refutes each aspect of the CLECs' claims, and indeed resoundingly affirms SBC's position here – *i.e.*, that CLECs are *not* impaired without UNE access to high-capacity loops and transport. That is so despite the resistance of the

[79] *See id.* ¶¶ 42-49; *see also Triennial Review Order* ¶ 372 (noting that "dedicated transport" generally refers not to distinct, point-to-point facilities, but rather to a dedicated *circuit* "channelized within [a] larger" facility and routed through multiplexers and de-multiplexers). Apart from its contrived methodology, the QSI study fails even on its own terms. In Wisconsin, one of the authors of that study expressly conceded that the *Triennial Review Order*'s wholesale trigger was satisfied on 16 transport routes identified by SBC. Yet the QSI analysis simply ignores that admission and fails to include any of those 16 routes. *See* Alexander/Sparks Decl. ¶ 54.

[80] *See* SBC Attach. C.

[81] *See* Alexander/Sparks Decl. ¶ 16. QSI's absurd conclusions in this respect are matched by those of the California PUC staff. As California PUC Commissioner Susan Kennedy has explained, the information the California PUC staff has presented to this Commission rests on a number of distortions and "would most certainly have been heavily challenged and very likely changed in a final decision had the parties been allowed to comment . . . or had the [California PUC] continued" its *Triennial Review* proceeding. Letter from the Hon. Susan P. Kennedy, Commissioner, California PUC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 & WC Docket No. 04-313, at 2 (Oct. 18, 2004) ("*Commissioner Kennedy Letter*").

CLECs in those proceedings to providing complete information about the nature and extent of their facilities deployment. In particular, the evidence from the state proceedings belies the two basic propositions on which the CLECs' claims of impairment are grounded: (i) that competitive carriers will deploy fiber only at the highest levels of demand; and (ii) that once a carrier has deployed fiber, it is available only to that carrier in particular and cannot be used by *other* CLECs seeking to provide service at a lower capacity.

First, contrary to the CLECs' overriding assertion, it is abundantly clear that CLECs deploy their own loop facilities at *all* capacities, including at capacities as low as the individual DS1 level. Thus, for example, whereas AT&T and others contend that carriers virtually never deploy loop facilities at capacity levels below three DS3s,[82] the discovery that the CLECs themselves provided in the state proceedings directly refutes that point. Indeed, although AT&T's discovery responses in the states often failed to provide capacity information for its deployed loop facilities, where it did provide such information, it made clear that *** *** of its deployed loops were at the one- or two-DS3 level.[83] Other carriers provided even more compelling evidence. *** ***, for example, disclosed that, in California, nearly *** *** of its deployed loops were at two DS3s or below.[84] Of

[82] *See, e.g.*, AT&T at iv; Advanced Telcom's Wigger Decl. ¶ 23; XO's Tirado Decl. ¶ 20; KMC's Duke Decl. ¶ 11 (attached to Loop & Transport Coalition); *see also* SNiP LiNK's Abate Decl. ¶ 10 (attached to Loop & Transport Coalition) (asserting that self-deployment is uneconomic unless committed demand is for OC-12 capacity).

[83] *See* Alexander/Sparks Decl. ¶ 21. While this evidence squarely contradicts the self-serving, unsupported claims AT&T has made in this proceeding, it is fully consistent with AT&T's own descriptions of its business plans. In 2002, for example, AT&T told investors that "over 20 percent [of its] T1-equivalent services [we]re on net and we're growing that every day with a real focus at a grass roots, granular level, building-by-building, address-by-address, of moving customers over." David Dorman, President, AT&T, Remarks at the Goldman Sachs Communacopia Conference, New York, N.Y. (Oct. 2, 2002).

[84] *See* Alexander/Sparks Decl. ¶ 21.

that number, more than *** *** consisted solely of DS1 level facilities.[85] Likewise, in both Texas and Oklahoma, carriers disclosed that they had deployed DS1 loops to numerous locations.[86] And MCI provided evidence showing that, in many if not most cases, deployment of fiber at the *** *** is economically feasible, a fact borne out by its admission that approximately *** *** of its loop deployments are at the one- or two-DS3 level.[87]

Equally important, the state records make clear that, once a carrier deploys fiber (whether in a transport network or as a last-mile facility), the facility can be (and routinely is) used to provide service at any level of capacity, simply by adjusting the electronics on either end.[88] Those electronics allow fiber to be "channelized" – so that a fiber lit at the OCn level can be used to provide services at single DS1 and DS3 levels as well[89] – and the Commission has already recognized them to be readily available to competing carriers.[90] Thus, once competitive fiber is in the ground, there is nothing stopping CLECs from using that fiber to provide any level of service to customers (and, therefore, nothing to warrant a finding that CLECs are impaired without access to ILEC facilities).[91]

Second, the subsidiary principle on which the CLECs rely – that there is no wholesale market for fiber, such that fiber in the ground is available only to the carrier that deployed it – is

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[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See* Fact Report at III-10-11.

[90] *See Triennial Review Order* ¶ 381 (CLECs are "not impaired by the costs of collocation and electronics necessary to activate dark fiber").

[91] *See* Fact Report at III-10-11 & Table 7 (collecting statements of competitive carriers revealing that they use their existing fiber to provide services at not only OCn levels, but also at DS1 and DS3 levels as well).

also incorrect. In this proceeding, AT&T contends that "DSn transport *wholesalers* are rarely available," and that AT&T itself "virtually never wholesales DSn services between its fiber based collocations in ILEC wire centers in a local area."[92] The state commission records, however, tell a very different story. Thus, for example, many of the carriers that are participants in this proceeding – including, among others, Level 3, McCleod, and Time Warner – expressly admitted in the states that they are currently providing or offering high-capacity transmission facilities to other carriers.[93] Moreover, those carriers that resisted such candor – including AT&T, MCI, and XO – were ultimately forced to admit that they do in fact provide high-capacity service on a wholesale basis.[94] MCI, for example, admitted that it makes transport facilities available *** *** and does so *** ***.[95] And AT&T's admissions in this respect are telling. Though insisting to the bitter end that it does not provide wholesale "loops" to other carriers, AT&T ultimately conceded that it does provide wholesale "service" – "service," it so happens, that consists of high-capacity transmission over AT&T's last-mile facilities.[96] AT&T's linguistic gymnastics, disingenuous as they are, thus do not change the fact that, as SBC demonstrated in its opening comments and as the Fact Report makes clear, carriers can and do obtain access to competitive fiber on a wholesale basis.

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[92] AT&T at 46-47; *see also, e.g.*, ALTS *et al.* at 76 ("wholesale DS1 transport is . . . unavailable in virtually every market"); Advanced Telcom's Wigger Decl. ¶¶ 38-48; KMC's Duke Decl. ¶¶ 21-25; SNiP LiNK's Abate Decl. ¶ 18.

[93] *See* Alexander/Sparks Decl. ¶ 26.

[94] *See id.* ¶¶ 27-31.

[95] *Id.* ¶ 27.

[96] *See id.* ¶¶ 51-53.

Finally, the state commission records also dispel the CLECs' claim that fixed wireless is not a viable last-mile alternative.[97] AT&T, for instance, states that "fixed wireless is so minimal that it is not material to the impairment analysis."[98] Yet, here again, AT&T's representation to this Commission is directly contradicted by its *own* discovery responses in the state proceedings. Thus, for example, in *** ***, AT&T identified page after page of specific business addresses that it considers to be "addressable," *today*, with its existing fixed wireless spectrum.[99] Other carriers provided similar information.[100] It is accordingly clear that, as SBC explained in its opening comments, there are intermodal alternatives that CLECs can use, and are using, to provide high-capacity services to enterprise customers. For the reasons explained above, the Commission must take those alternatives into account.

c. The CLECs' Claims of Operational Impairment Are Belied by the Evidence

As SBC anticipated they would,[101] the CLECs raise a series of operational issues that they claim creates impairment. In particular, they point to three ostensible concerns: the need to obtain rights-of-way and permits to deploy new facilities, the requirement to obtain building access in order to light a new premises, and the costs and delay associated with construction.[102]

As SBC explained in its opening comments, the short answer to these considerations is that competitive carriers have overcome them in a multitude of circumstances. Again,

[97] *See, e.g.*, Sprint at 46; Advanced Telcom's Wigger Decl. ¶¶ 25-29; XO's Tirado Decl. ¶¶ 22-29; AT&T at 76.

[98] AT&T at 76.

[99] *See* Alexander/Sparks Decl. ¶ 22.

[100] *See id.* (noting discovery responses of *** ***).

[101] *See* SBC at 80-82.

[102] *See, e.g.*, AT&T at 57-60; ALTS *et al.* at 63; Sprint at 43, 45-46; XO's Tirado Decl. ¶ 17; KMC's Duke Decl. ¶ 8.

competitive carriers have deployed more than 320,000 route miles of fiber. There is an average of 19 fiber rings in each of the top 50 MSAs. CLECs have lit an average of almost ten buildings in SBC wire centers with at least 15,000 business lines. And, of course, CLECs have relied on special access far more than they have relied on access to UNEs. The Commission has explained that "actual marketplace evidence is the most persuasive and useful kind of evidence submitted," and that such evidence "demonstrates better than any other kind what business decisions actual market participants have made regarding whether it is feasible to provide service without relying on the incumbent LEC" and "shows . . . whether *new entrants*, as a practical matter, *have surmounted barriers to entry*."[103] In light of the abundant evidence of actual competitive deployment, the operational issues the CLECs identify cannot be said to "preclude" competitive entry.

That point is confirmed, moreover, by the evidence assembled in the state commission proceedings. That evidence is replete with literally *thousands* of discrete instances in which CLECs were able to overcome any operational impediments and deploy their own facilities.[104] Moreover, when pressed on the specific question of building access, the CLECs were, almost without exception, unable to identify a single instance in which they had requested and been denied building access.[105] Indeed, in the state proceedings, CLECs expressly conceded that they have been able to obtain whatever building access they needed to reach their customers, including access to riser cable.[106] Particularly in light of these admissions, the CLECs' claims of

[103] *Triennial Review Order* ¶ 93 (second emphasis added).

[104] *See* Alexander/Sparks Decl. ¶ 61.

[105] *See id.* ¶¶ 61-62.

[106] *See id.* ¶¶ 19, 61.

operational impairment should be seen for what they are – unproven assertions, designed solely for the benefit of this Commission, that have no basis in fact.

Moreover, quite apart from the indisputable evidence that competitors have overcome any operational issues in thousands upon thousands of instances, the CLECs have wholly failed to satisfy their evidentiary burden of establishing that these issues "preclude" efficient carriers from entering and competing without UNE access to ILEC facilities. In particular, for the most part, the CLECs provide no discrete examples where they have been prevented from providing service as a result of these issues, much less do they attempt to identify the circumstances in which these issues cannot be overcome. Instead, as they have done since 1996, they simply pose a list of theoretical concerns, assert that they are too difficult to overcome, and then ask the Commission to find impairment.[107] That showing fails on its face to warrant a finding of impairment, particularly where, as here, there is abundant evidence of competitive supply.

In any event, even if the CLECs had provided adequate evidence in this respect – and putting aside the fact that competitors have *already* overcome these issues in innumerable instances – these claims would still be insufficient to establish impairment. As we have explained, under *USTA I* and *USTA II*, if there is a direct solution to a problem that does not involve the enormous social costs of unbundling, the Commission must pursue that solution, rather than impose unnecessary costs on consumers and the economy.[108] That principle applies with considerable force here, where the issues the CLECs raise have previously been the subject of Commission proceedings. Thus, for example, the Commission has already banned exclusive

[107] *See, e.g.*, ALTS *et al.* at 63 (asserting, but not quantifying or describing in detail, purported "real world entry barriers associated with providing DS3 loops"); Sprint at 43, 45-46; XO's Tirado Decl. ¶ 17; KMC's Duke Decl. ¶ 8.

[108] *See* SBC at 34-36; *USTA II*, 359 F.3d at 570-71.

access arrangements in commercial buildings, and, if an ILEC is in a building, a CLEC has the right to use the ILEC's in-building risers and conduits to reach its customers.[109] The CLECs cannot use this Commission's alleged failure to regulate issues such as these effectively – or the CLECs' failure to avail themselves of remedies already available to them – to bootstrap a finding of impairment and, thereby, to impose the costs of unbundling.

Finally, for similar reasons, the Commission should disregard the CLECs' litigation-inspired "business studies" that purport to document the difficulties and expense associated with deploying fiber.[110] As the declaration of James E. Keown explains, these studies – all of which rest on the counterintuitive proposition that competitors have deployed hundreds of thousands of route miles of fiber with virtually no ability to use it – vastly overstate the costs associated with deploying fiber. Most significantly, these studies assume that CLECs must trench and lay conduit from the location of each new customer to the nearest splice point, when in fact an efficient carrier would, in the overwhelming majority of circumstances, use *existing* conduit (either its own or leased from the ILEC).[111] Conduit is by far the most significant cost component of new fiber deployment, and the CLECs' contrived effort to overstate the incidence of that cost renders their studies meaningless.[112] The truth is that, if the CLECs really wanted the

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[109] *See* 47 C.F.R. § 64.2500; First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, ¶ 80 (2000).

[110] *See* AT&T at 36-37; *see also*, *e.g.*, Sprint at 43; Advanced Telcom's Wigger Decl. ¶¶ 19-24; KMC's Duke Decl. ¶ 9.

[111] *See* Keown Decl. ¶¶ 9-10.

[112] *See id.* ¶¶ 8-12. AT&T's deployment study overstates the cost of new fiber deployment by an efficient carrier in other ways as well. *See, e.g., id.* ¶ 13 (explaining that, contrary to AT&T's assumption, technology permits each central office optical terminal to terminate multiple remote optical terminals at multiple customer premises).

Commission to know where they could deploy their own facilities, they would tell the Commission where they had already done so, and then permit the Commission to draw the inferences the D.C. Circuit has said are required here. The fact that they have not done so – and have instead resorted to artificially inflated estimates of the costs of and impediments to fiber deployment – only confirms what the evidence assembled in the state commission records makes clear: that efficient carriers can and do rely extensively on competitive fiber, at capacities well below the thresholds the CLECs claim are necessary to warrant self-deployment.

3. CLECs Can and Do Compete Using ILEC Special Access

The CLECs concede that high-capacity UNEs and special access services are, as a functional matter, interchangeable.[113] They also concede that they broadly rely on special access successfully to serve customers. Indeed, there is no dispute that CLECs rely on special access far more often than they rely on high-capacity UNEs. AT&T has previously admitted that as much as *98%* of the approximately 40,000 DS1s it obtains from ILECs to provide last-mile connectivity to customers – customers to whom it provides local service – are purchased as special access, not as UNEs.[114] In the state commission proceeding in Texas, ***

*** identified page after page of customers that it was serving over ILEC facilities, *none* of which was obtained on an unbundled basis.[115] In its comments here, AT&T itself emphasizes that the maps that SBC and others have submitted to the Commission show the prevalence of

[113] *See, e.g.*, AT&T at 16 ("High capacity loops and transport can be provided as UNEs or as special access.").

[114] *See AT&T Transport Ex Parte* at 10.

[115] *See* SBC Attach. A-TX, Exh. 7, parts 1-2.

CLEC use of special access, even in urban areas where other CLECs have deployed their own fiber.[116]

It is not only the larger CLECs, like AT&T and MCI, that are successfully using special access to compete. While the smaller CLECs for the most part refuse to inform the Commission of the extent of their use of special access,[117] that use in fact is extensive. SBC provides CLECs other than AT&T, MCI, and Sprint with a total of more than 69,000 DS1 special access channel terminations. No fewer than eight CLECs (not counting AT&T, MCI, or Sprint) purchase nearly all of their high-capacity facilities from SBC as special access, not UNEs. Numerous others rely predominantly on special access. These figures are consistent with the filing of Conversent, which provides the Commission with a state-by-state breakdown of the percentages of customers it serves using DS1 UNE loops, and which acknowledges that in no state does this percentage exceed 50%, thus indicating that it relies on special access more often than it relies on UNEs.[118] In light of these numbers, the CLECs' conclusory claims that they do not or cannot use special access to compete – or that they inevitably lose money when they try to – cannot be credited.

[116] *See, e.g.*, AT&T at 69 ("SBC's data show that there are more than 436 instances in which a competitor is using SBC's special access services to serve customer locations on the *same streets* where competitive fiber is in place.").

[117] Most members of the Loop & Transport Coalition do not provide information on the frequency with which they use special access, even though at least two of them (Xspedius and Advanced Telcom) do provide such information. Significantly, the declarations provided by the members of the Loop & Transport Coalition are otherwise virtually identical with respect to the information they provide. The obvious inference is that, putting aside Xspedius and Advanced Telcom (who report that special access makes up 31% and 5%, respectively, of the DS1 loops they purchase), these companies make extensive use of ILEC special access, and they are afraid to inform the Commission of that fact because they know it will hurt their case.

[118] *See* Conversent's Shanahan Decl. ¶¶ 26, 33, 37, 42, 47, 53, 58 (attached to ALTS *et al.*).

In the CLECs' view, the Commission should ignore this evidence, and adopt a rule "that treats the availability of tariffed special access services as irrelevant to unbundling determinations."[119] The Commission can do no such thing. The Supreme Court and the D.C. Circuit, not to mention simple common sense, establish that CLECs' proven success in competing with special access is highly relevant to whether they are "precluded" from entry absent unbundling. And, in the face of that proven success, the CLECs' claims to the contrary – that ILECs face no competition in the special access market, that they impose draconian terms on wholesale special access customers, and that they may one day in the future raise special access rates to effect a price squeeze – fall well short of establishing that special access does not provide a meaningful competitive alternative.

a. *Iowa Utilities Board* and *USTA II* Require the Commission To Consider CLEC Use of Special Access

The Supreme Court made clear in *Iowa Utilities Board* that the impairment standard is not satisfied simply because access to facilities at UNE rates will decrease CLECs' costs. As the Court explained, the "assumption that *any* increase in cost . . . causes the failure to provide [an] element [on an unbundled basis] to 'impair' the entrant's ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of th[at] term[]."[120] Here, there is no dispute that CLECs are broadly using special access to compete for local customers, and that allowing unbundled access to those same facilities would merely give them a price break. Indeed, the CLECs themselves emphasize that fact, trumpeting the cost advantage they would

[119] *See* AT&T at 84; MCI at 152; Loop & Transport Coalition at 39-40.

[120] 525 U.S. at 390.

enjoy if they are entitled to obtain special access facilities at TELRIC rates.[121] Under *Iowa Utilities Board*, that is reason enough to reject the CLECs' broad claims of impairment.

The D.C. Circuit, moreover, made that point unequivocally clear in *USTA II*. As noted above, the court there emphasized that the Commission must "consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."[122] As the court observed, "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition."[123] Consistent with that overriding purpose, "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic."[124] The court reiterated this point later, noting that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . *precludes* a finding that the CLECs are 'impaired' by lack of access to the element."[125]

Nor is it correct to assert, as the CLECs do, that the *USTA II* court's discussion of special access was confined to the *Triennial Review Order*'s decision to permit access to UNEs for the

[121] *See, e.g.*, Advanced Telcom's Wigger Decl. ¶ 54; Broadview's Sommi Decl. ¶¶ 14-15 (attached to Loop & Transport Coalition); Xspedius' Falvey Decl. ¶ 35; Talk America's Brasselle Decl. ¶ 11 (attached to Loop & Transport Coalition); XO's Tirado Decl. ¶¶ 42-43.

[122] *USTA II*, 359 F.3d at 577.

[123] *Id.* at 576.

[124] *Id.* at 592.

[125] *Id.* at 593 (emphasis added).

purpose of providing wireless service.[126] In fact, the court took great pains to make clear that its discussion was *not* limited in this manner. The court specifically directed its discussion of tariffed services to paragraph 102 of the *Triennial Order Review*, which in turn fell under the general heading "Interpretation of the 'Impair' Standard" and which purported to deny the relevance of special access in determining impairment for any and all telecommunications services, not just wireless.[127] Moreover, by its terms, the court plainly stated that its general principle – *i.e.*, that CLECs "cannot" be considered impaired where they are using special access successfully to compete – applies to all "relevant markets," not just to wireless.[128] Finally, the court reiterated that general principle in crediting the ILECs' "independent attack on the Commission's decision to allow 'conversions' of wholesale special access purchases to UNEs."[129] In that context, the court again explained that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that the CLECs are 'impaired' by lack of access to the element."[130]

In short, the principle the Commission adopted in the *UNE Remand Order* and reaffirmed in the *Triennial Review Order* – that CLECs' use of special access is to be "afford[ed] little

[126] *See, e.g.*, AT&T at 81-85; Loop & Transport Coalition at 72; ALTS *et al.* at 13-15.

[127] *Compare Triennial Review Order* ¶ 102 ("[M]any commenters have urged us to find that requesting carriers are not necessarily impaired if they can use incumbent LEC resold or retail tariffed services, such as special access, to provide their retail service. We decline to adopt this position.") (footnote omitted) *with USTA II*, 359 F.3d at 576-77 (comprehensively addressing paragraph 102 and explaining that the Commission's decision to deem special access use as irrelevant to the unbundling analysis was inconsistent with the Act).

[128] *Id.* at 592.

[129] *Id.* at 593.

[130] *Id.*

weight" in the Commission's impairment analysis[131] – is no longer good law. Rather, the D.C. Circuit has made clear, beyond any legitimate dispute, that the CLECs' proven use of special access to serve customers conclusively establishes that CLECs are not impaired without unbundled access to those same facilities.

b. The CLECs' Allegations About Special Access Competition Are False

Competition in special access began well before the 1996 Act, and, by 2000, it was sufficiently advanced that the Commission could describe it as a "mature source of competition in telecommunications markets."[132] Even so, the CLECs claim that ILECs face insufficient competition in special access markets, and that, as a result, special access is not a viable input in their efforts to compete in the local market.[133]

This claim simply cannot be squared with the facts. As noted at the outset, SBC provides approximately 400,000 wholesale DS1 channel terminations to CLECs – more than three times the number of DS1 UNE loops it provides.[134] At the DS3 level – where self-deployment is higher and use of ILEC facilities lower – SBC provides approximately 28 DS3 channel terminations for every DS3 UNE loop.[135] Moreover, as noted above, SBC has won a paltry share of the enterprise market. If SBC possessed the special access market power the CLECs claim,

[131] *Triennial Review Order* ¶ 102; *see* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶¶ 67-70 (1999) ("*UNE Remand Order*"), *petitions for review granted*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

[132] *Supplemental Order Clarification* ¶ 18.

[133] *See, e.g.*, MCI at 166; ALTS *et al.* at 14; Loop & Transport Coalition at 64-65.

[134] *See* Casto Reply Decl. ¶ 9.

[135] *See id.*

one would expect it to be enjoying far greater success in the enterprise market. The fact that it is not bears out the truth of what the CLECs themselves have told investors: "'[T]he large corporate enterprise market . . . is all but irrelevant in the debate over competition policy because *there are no bottleneck facilities*.'"[136]

The CLECs nevertheless assert that, because ARMIS data supposedly show that SBC earns a high rate of return on interstate special access, it must be the case that SBC has market power.[139] But, for one thing, an ARMIS-based calculation – even assuming it to be accurate – reveals only an *accounting* rate of return, not an *economic* rate of return, and it therefore by definition says nothing whatsoever about market power.[140] And, in any case, the calculation on which the CLECs rely is *not* accurate. SBC's interstate special access revenues have grown substantially in the last several years, and their rate of growth has far outpaced the rate of growth for both intrastate services and other interstate services. Yet SBC is required to report *costs* in ARMIS according to allocation factors that were based on usage studies from the late 1990s. The result is that, while SBC's interstate special access revenues have grown as a percentage of SBC's overall revenues, the costs against which the CLECs compare those revenues have not kept pace. Thus, for example, while SBC's interstate special access revenues grew from 30 percent of total interstate revenues in 1999 to over 48 percent in 2003, the amount of interstate costs allocated to special access over the same period increased at a much lower rate. In particular, between 1999 and 2003, the share of interstate telephone plant allocated to special

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[136] Fact Report at III-33 (quoting Royce Holland, former CEO of Allegiance and founder of MFS) (alteration in original).

[139] *See, e.g.*, Loop & Transport Coalition at 45-46; ALTS *et al.* at 25.

[140] *See, e.g.*, F. Fisher & J. McGowan, *On the Misuse of Accounting Rates of Return To Infer Monopoly Profits*, 73 Am. Econ. Rev. 82, 83 (Mar. 1983).

access grew from 23 percent to only 29 percent, while the share of interstate average net investment allocated to special access increased from 23.8 percent to 28.8 percent. As these figures show, the amount of SBC's interstate investment allocated to special access for accounting purposes in no way reflects the share of that investment actually used to provide special access services. The rate-of-return figures identified by the CLECs thus reflect nothing more than a regulatory lag in the manner in which SBC is required to report its accounting costs, a matter borne out by the fact that, even as ARMIS suggests a high accounting rate of return for interstate special access in 2003, the corresponding figure for interstate switched access fell to negative 4.9 percent. The figures on which the CLECs rely, in short, provide no insight into the return SBC is earning in the special access market, much less do they support the claim that SBC enjoys special access market power.

As the reply declaration of Parley C. Casto explains, moreover, the absence of market power stemming from SBC's special access offerings is borne out by a third-party special access study that SBC recently commissioned. This study – which was performed by New Paradigm Resources Group, and which SBC undertook for *business* reasons, in order to obtain a better understanding of the special access market – confirms that SBC faces robust competition from alternative special access providers. In particular, New Paradigm identified 12 alternative wholesale special access providers in 15 major markets in SBC's region. These alternative providers – which include numerous carriers, such as AT&T, MCI, Time Warner, and Level 3, with national scope – sell DS1 level and above special access in virtually all of these markets, and many of them also sell wholesale dark fiber.[137] Indeed, New Paradigm estimated that CLECs, the largest and most established special access competitor group, sell approximately

[137] *See* Casto Reply Decl. ¶¶ 7-8.

65% of their special access services to other carriers, most of which is to wireline carriers. Similarly, alternative transport providers, which are also major players in the high-capacity market, sell about 60% percent of their special access services to other carriers (again, most of which is to wireline carriers).[138] And these providers – both CLEC special access providers and other competitive providers – offer special access at rates that typically were 15-30% below, and sometimes more than 35% below, SBC's tariffed rates.[139] In light of these wholesale figures, the suggestion that CLECs have no special access alternatives – particularly in the more densely populated wire centers where SBC's compromise proposals would limit DS1 unbundling – cannot be credited.[140]

Finally, the proof of all of this is in the highly competitive special access rates that SBC makes available to its wholesale customers. Far from increasing across-the-board as the CLECs falsely assert,[141] SBC's rates for DS1 special access have dropped 11% over the past three years.[142] When SBC's MVP rates are taken into account, the percentage drop reaches 14%, and it extends still further once pricing flexibility contracts are included.[143] What is more, as explained at the outset, SBC has taken aggressive steps to ensure that its deepest special access discounts are available to large and small carriers alike, and it has gone to great lengths to structure extremely attractive special access offers, particularly for the mid-size carriers that are

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[138] *See id.* ¶ 7.

[139] *See id.* ¶ 8.

[140] SBC's opening comments reported the results of this market share analysis on a statewide basis. The data described above and reflected in Parley Casto's reply declaration represent SBC's share in particular MSAs in which SBC is the incumbent LEC.

[141] *See, e.g.*, MCI at 154-62; ALTS *et al.* at 59; Loop & Transport Coalition at 41-47; Sprint at 36.

[142] *See* Casto Decl. ¶¶ 8-9; Casto Reply Decl. ¶ 31.

[143] *See* Casto Reply Decl. ¶ 31.

among the most vocal critics of SBC's wholesale offerings.[144] These steps – like the aggressive discount plans, described in Parley Casto's opening declaration, that SBC put in place in collaboration with its largest wholesale customers – are fundamentally inconsistent with the suggestion that SBC enjoys market power in special access and are instead reflective of the intense, facilities-based competition in the market today.

Nor is it the case, as various CLECs assert, that, in order to obtain SBC's discounted special access offerings, CLECs must agree to "lock-up" 95% of their traffic with SBC.[145] As SBC explained in its opening comments, the provisions to which these commenters refer require only that, in order to obtain the additional discounts available in SBC's MVP plan, carriers commit to take the specified proportion of the high-capacity services they buy from SBC *as special access and not as UNEs.*[146] AT&T is thus incorrect to suggest that SBC requires carriers to forgo self-deployment or reliance on alternative providers in order to obtain the deepest discounts for special access.[147] What is more, the specific figure (95%) was actually negotiated with one of SBC's first, and largest, MVP customers,[148] which shows not only that the CLECs

[144] *See id.* ¶¶ 35, 49-62.

[145] *See, e.g.*, Loop & Transport Coalition at 62-63. AT&T is by far the fondest of this claim, asserting it no fewer than four times. *See* AT&T at 149-50; *id.* at 151 ("A carrier that subscribes to a lock-up OPP must agree to provide the vast majority of its traffic to the Bell."); *id.* at 163 ("A customer with a specific level of demand that is willing to deal (almost) exclusively with the Bell receives a special discount, but a customer that is willing to commit the *exact same level of demand* in the future (but wishes to divert a portion of its demand to a Bell competitor) is barred from receiving the discount."); *id.* at 168 (competitors "must agree to lock-up the vast majority of their traffic with the Bell and not deal with the Bells' rivals").

[146] *See* SBC at 68 & n.222; Casto Decl. ¶ 22.

[147] *See* Casto Decl. ¶ 22; Casto Reply Decl. ¶ 36.

[148] *See* Casto Reply Decl. ¶ 14.

that rely upon have every expectation that they can use special access to compete, but also the disingenuousness of AT&T's claims in this proceeding.

AT&T is also incorrect to contend that the minimum volume requirements in SBC's MVP plan prevent carriers from relying on alternative sources of high-capacity transmission.[149] As an initial matter, it bears emphasis that carriers can obtain discounts of more than 40% off SBC's special access rack rates without making any volume commitment *at all*, simply by purchasing services under a three-year or five-year term plan.[150] In any event, the additional discounts of 9-14% available under SBC's MVP plan are tied to historical volumes of special access use. To the extent carriers have used their own facilities or alternative wholesalers of special access, they can continue to do so, just as they are free to look elsewhere as they expand their business to meet new demand. Moreover, if a carrier falls short of those volumes, it typically has the effect only of reducing the discount, not (as AT&T falsely claims) triggering severe liability.[151] The MVP discounts thus do not improperly "lock-in" customers.

Of course, AT&T knows all this. Its own submissions here establish that it obtains fully *** *** of its DS3 loops and at least *** *** of its DS1 loops from alternative sources (either from competitive suppliers or through self-deployment).[152] In the last two years, moreover, AT&T has moved *** *** from special access circuits provided by SBC to competitive facilities. It has done all of this, moreover, even as it has voluntarily *** ***. This conduct – which serves to confirm the abundant evidence of

[149] *See* AT&T at 149-50.

[150] *See* Casto Reply Decl. ¶ 34.

[151] *See id.* ¶¶ 17, 20, 37.

[152] *See* AT&T at 42; AT&T's Fea/Giovannucci Decl. ¶ 65.

competitive high-capacity facilities in the market – is flatly inconsistent with AT&T's claim that SBC's special access offerings constrain carriers from using competitive facilities.[153]

c. The CLECs' Speculative Concerns About a Purported "Price Squeeze" Are Theoretically and Factually Specious

The CLECs also contend that special access cannot be considered here because of what they describe as the "inevitable" price squeeze that would result.[154] They emphasize the D.C. Circuit's statement that supposed "complications" associated with taking special access into account – in particular, the ILECs' purported "incentive to set the tariff price as high as possible and the vagaries of determining when that price gets so high that the 'impairment' threshold has been crossed" – "*might* raise real administrable issues" that "*might in principle* support a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment."[155] As they see it, the prospect of a price squeeze, in which ILECs would raise wholesale special access rates higher than retail rates in order to foreclose competition in the retail market, is just such a "complication," and, according to the CLECs, it supports reinstating a rule in which special access is irrelevant to impairment.[156] This claim – which, it bears emphasizing, is sheer speculation without even a hint of factual support in the record – is woefully inadequate to justify disregarding the CLECs' use of special access.

As an initial matter, it is important to stress that the CLECs face an extremely high burden in attempting to convince the Commission to ignore special access. As noted above, and

[153] The Commission has already rejected AT&T's argument (at 149) that it should in this context interfere with the functioning of the special access market by "declar[ing]" unlawful various ill-defined provisions of ILEC special access tariffs that AT&T doesn't like. *See Triennial Review Order* ¶ 698.

[154] *See, e.g.*, Loop & Transport Coalition at 48-51; MCI at 166-68.

[155] *USTA II*, 359 F.3d at 576 (emphases added).

[156] *See, e.g.*, AT&T at 86-90; MCI at 166-68; Loop & Transport Coalition at 48-51.

as the CLECs do not dispute, competitive carriers are using special access *today* to serve the enterprise market successfully. And, contrary to the CLECs' claims, particularly in light of that evidence, the Commission cannot continue to ignore special access simply by asserting the existence of *possible* "complications." On the contrary, the court emphasized that "where (as here) market evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) don't impede competition, and where (as here) there is no claim that ILECs would be able drastically to hike those rates," the "possible complications" on which the CLECs rely "recede even further in the background."[157] In light of this statement, the burden is thus on the CLECs to show, with actual evidence, not implausible and speculative assertions, that consideration of special access will *in fact* preclude them from entering specific markets.

In asserting the possibility of a price squeeze in the enterprise market, moreover, the CLECs have picked an extremely unlikely vehicle for satisfying that burden. To prevail on this assertion, the CLECs would have to establish not only that ILECs could and would in fact raise the wholesale price of special access enough to foreclose competition in the retail market, but also that, having actually foreclosed competition, they could then raise retail prices to supracompetitive levels and keep them there long enough to recoup any losses sustained in their predatory campaign. As the Supreme Court has observed, this is no easy task. On the contrary, because "[t]he success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. . . , *there is*

[157] *USTA II*, 359 F.3d at 576.

a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."[158]

That is especially so, moreover, where (as here) the alleged monopolist faces regulation at the wholesale level. Indeed, as then-Judge Breyer explained in his seminal opinion in *Town of Concord v. Boston Edison Co.*, "where [an alleged monopolist's] prices are regulated at both the primary and secondary levels," a price squeeze is so unlikely that, as an antitrust matter, it is not even worth *asking* about it.[159] As the court there stressed – in words subsequently echoed by the Commission in the price-squeeze context – "a practice is not 'anticompetitive' simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is 'anticompetitive' *only if it harms the competitive process*."[160] And, critically, where regulators are required to ensure that a wholesale product be priced at "reasonable" rates – as is the case with special access – then such competitive harm is virtually impossible.[161] Rather, as the Commission itself has observed, in such circumstances, "carriers are likely to squeeze competitors who buy from them . . . only if those competitors operate less efficiently, *i.e.*, at higher costs."[162] And that sort of "price squeeze," of course, is fully consistent with competition on the merits.

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[158] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (emphasis added).

[159] 915 F.2d 17, 22 (1st Cir. 1990).

[160] *Id.* at 21 (emphasis added); *see* Memorandum Opinion and Order, *INFONXX, Inc. v. New York Tel. Co.*, 13 FCC Rcd 3589, ¶ 21 (1997).

[161] *See Town of Concord*, 915 F.2d at 25.

[162] *INFONXX* ¶ 21; *see also Town of Concord*, 915 F.2d at 26 (where the wholesale input is regulated, "an integrated utility's prices are likely to squeeze independent distributors who buy from it at wholesale only if those distributors operate less efficiently. . . . Consequently, a rule

There can be no serious dispute, moreover, that this principle – *i.e.*, that the Commission's obligation to regulate wholesale inputs makes a price squeeze theoretically implausible – applies in this context. As the Commission itself has made clear, "price cap regulation of the BOCs' access services sufficiently constrains a BOC's ability to raise access prices to such an extent" that the BOC could create a price squeeze.[163] And, where BOCs have won relief from price caps, that is because the Commission has expressly found that there is already sufficient competition to prevent a price squeeze. Thus, to MCI's contention that pricing flexibility would result in predatory conduct, the Commission has already held that it had "adopt[ed] Phase I triggers to ensure that incumbent LECs cannot drive competitors from the market through targeted rate reductions; these safeguards are adequate to address MCI's concern."[164] Likewise, Phase II pricing flexibility relief is available only after "competitors have established a significant market presence in the provision of the services at issue," and "the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior" of the type posited by the CLECs here "costly and *highly unlikely to succeed*."[165]

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preventing prices that create a squeeze will more likely discourage efficient operations and deprive consumers of prices that reflect lower costs.").

163 Second Report and Order, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, ¶ 126 (1997) ("*LEC Classification Order*").

164 Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 130 (1999) ("*Pricing Flexibility Order*"), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

165 *Id.* ¶¶ 69, 80 (emphasis added); *see WorldCom Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001) (affirming *Pricing Flexibility Order*, and explaining that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior"); *see also* Declaration of William E. Taylor, Timothy J. Tardiff, and Harold Ware, National Economic Research Associates, Inc., on Behalf of BellSouth, SBC, and

Quite apart from being fanciful as a matter of theory, moreover, the CLECs' price squeeze allegations are wholly unsupported by the facts. In the 271 context, the Commission set forth a list of factors that proponents of a price-squeeze claim would have to meet in order to make out a claim. In particular, the Commission has made clear that, to establish a price-squeeze claim, a party would have to show that that a Bell company's pricing behavior "'*doom[s]* competitors to failure'" in the relevant retail market.[166] And, on the cost side, the Commission has also made clear that competitors' bare assertions about the internal costs they face will not suffice.[167] On the contrary, commenters that wish to make out a price-squeeze claim must provide, at a minimum, "cost and other data" to calculate "a sufficient profit for an efficient competitor."[168]

The CLECs do not even attempt to address these requirements. Nor could they. As noted above and explained in our opening comments, the CLECs have an extensive track record of proven reliance on special access. That track record – particularly when coupled with the undeniable fact that Bell companies are, by comparison, bit players in the enterprise market – makes it impossible to assert that reliance on special access "dooms competitors to failure," or that the internal costs that efficient CLECs face are too high to permit competition. Simply put, if that were the case, the bulk of SBC's special access sales would be at *retail*, as the CLECs

Verizon (rebutting in detail allegations of special access price squeeze), attached to Ex Parte Letter from Mary L. Henze, BellSouth, Michelle Thomas, SBC, and Dee May, Verizon, to Marlene Dortch, FCC, CC Docket Nos. 00-175, 01-337, 02-33 (FCC filed Aug. 10, 2004).

[166] *E.g.*, Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Vermont*, 17 FCC Rcd 7625, ¶ 66 (2002) (quoting *Sprint Communications Co. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. 2001)), *appeal dismissed*, *AT&T Corp. v. FCC*, No. 02-1152, 2002 WL 31619058 (D.C. Cir. Nov. 19, 2002).

[167] *See id.* ¶ 70.

[168] *Id.*

would be unable meaningfully to compete at the retail level (at least when they elected to rely on ILEC special access facilities rather than competitive facilities). In fact, however, as noted above, the vast bulk of those sales – more than 90% at *both* the DS1 and DS3 level – are *wholesale*. That fact alone dispels the CLECs' suggestion that they cannot compete at the retail level with special access.[169]

Presumably recognizing as much, the CLECs contend that, even if the ILECs have not effected a special access price squeeze yet, they may nevertheless do so in the future. That is so, the theory goes, because, whereas the prohibition on Bell companies' provision of long-distance service had diminished their incentive to engage in a price squeeze, they have now received long-distance relief in all of their 271 states, and they accordingly are now able to compete on a meaningful basis in the enterprise market, making a price squeeze more worthwhile than it has been previously.

This theory is badly flawed. First, it is far too speculative to warrant a finding that CLECs are impaired by using special access to serve the enterprise market. The question before the Commission is whether competition is impaired *today* in circumstances where CLECs are relying on special access. It self-evidently is not, and the assertion that this may one day change,

[169] The only actual allegations of a price squeeze in the CLECs' comments are AT&T's contentions that (i) switched access rates, coupled with low retail long-distance rates from SBC drove it from the residential long-distance market, and (ii) a special access price squeeze drove it from the Frame Relay market in SBC's region. As to the former, AT&T's own president and CEO has attributed its departure from the consumer long-distance market not to the anticompetitive behavior that AT&T alleges here, but rather "to recent regulatory developments and a highly competitive market." *Curran, Analysts: AT&T Charges, Layoffs Positive in Short Term*, TR Daily, Oct. 8, 2004, at 1. This of course is fully consistent with the principle explained in the text that where, as here, the wholesale input is regulated, a price squeeze will drive only inefficient competitors from the market. As to the latter allegation, AT&T's claim – which in all events is far too undeveloped to be relied upon by the Commission – is belied by the fact that SBC's access rates leave ample opportunity for an efficient competitor to compete. *See* Casto Reply Decl. ¶¶ 39-42 & Table A.